(23)

Supreme Court, U.S.
FILED
SEP 13 2004
OFFICE OF THE CLERK

No. 03-388

In the Supreme Court of the United States

DENNIS BATES, *ET AL.*,
Petitioners,

v.

DOW AGROSCIENCES LLC,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, CALIFORNIA, CONNECTICUT, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEW YORK, OHIO, OKLAHOMA, UTAH, VERMONT, VIRGINIA, AND WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

SEAN D. JORDAN
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*
[Additional counsel listed on inside cover]

TROY KING
Attorney General of Alabama

BILL LOCKYER
Attorney General of California

RICHARD BLUMENTHAL
Attorney General of Connecticut

LISA MADIGAN
Attorney General of Illinois

THOMAS J. MILLER
Attorney General of Iowa

THOMAS F. REILLY
Attorney General of Massachusetts

MIKE HATCH
Attorney General of Minnesota

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MIKE McGRATH
Attorney General of Montana

ELIOT SPITZER
Attorney General of New York

JIM PETRO
Attorney General of Ohio

W.A. DREW EDMONDSON
Attorney General of Oklahoma

MARK L. SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

JERRY W. KILGORE
Attorney General of Virginia

CHRISTINE O. GREGOIRE
Attorney General of Washington

QUESTION PRESENTED

Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136-137 ("FIFRA")?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of *Amici Curiae* 1

Summary of the Argument 3

Argument 5

I. The Text and Regulatory Framework of FIFRA Do Not Support the Conclusion That the Statute Preempts State Law Crop-Injury Claims 6

A. The Court's Analysis Is Guided by the Presumption Against Preemption and the Purpose of Congress in Enacting FIFRA 6

B. The Text of Section 136v and the Overall Regulatory Structure of FIFRA Do Not Provide Clear and Manifest Evidence of Congressional Intent to Preempt Crop-Injury Claims 8

1. Crop-Injury Claims Do Not "Impose" a State "Requirement" for Labeling or Packaging 8

2. The EPA Does Not Regulate the Efficacy of Pesticides When Approving Pesticide Labels . 10

3. The EPA's Regulations Define the Domain Preempted By Section 136v and Confirm That State Law Crop-Damage Claims Are Not Preempted 14

C. The Presumption Against Preemption Applies with Special Force Where the Federal Government Has Chosen Not to Regulate 16

II. The Legislative History of FIFRA Confirms that Congress Did Not Intend to Preempt State Law Crop-Injury Claims 20

A. FIFRA's Legislative History Supports the Conclusion That Congress Did Not Intend to Displace Crop-Injury Claims 20

B. The Court Should Not Infer Preemption of State Law Tort Claims Based Upon Federal Limitations of Direct Regulations or Positive Enactments of State Governments 24

Conclusion 26

TABLE OF AUTHORITIES

Cases

Almond Hill Sch. v. United States Dep't of Agric.,
768 F.2d 1030 (CA9 1985) 26

American Cyanamid Co. v. Geye,
79 S.W.3d 21 (Tex. 2002) 15, 16

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 18

Bean v. Diamond Alkali Co.,
454 P.2d 69 (Idaho 1969) 21

Bethlehem Steel Co. v. New York State Labor Relations Bd.,
330 U.S. 767, 780 (1947) 19

California v. ARC Am. Corp.,
490 U.S. 93 (1989) 19

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 7, 8, 17, 19, 24, 25

Daniels v. Atlantic Ref. Co.,
295 F.Supp. 125 (D. Del. 1968) 21

Diamond Alkali Co. v. Godwin,
112 S.E.2d 365 (Ga. Ct. App. 1959) 21

Eaton Fruit Co. v. California Spray-Chem. Corp.,
445 P.2d 437 (Ariz. 1968) 21

Ebers v. Gen. Chem. Co.,
17 N.W.2d 176 (Mich. 1945) 21

Edelman v. Jordan, 415 U.S. 651 (1974) 18

English v. General Electric Co.,
496 U.S. 72 (1990) 25

Etcheverry v. Tri-Ag Service, Inc.,
No. S072524, Cal. Sup. Ct. (Mar. 1999) 23

Fairfax's Devisee v. Hunter's Lessee,
11 U.S. (7 Cranch) 603 (1812) 20

Fla. Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 19

Gade v. Nat'l Solid Waste Mgmt. Ass'n,
505 U.S. 88 (1992) 7

Gen. Motors Corp. v. Abrams,
897 F.2d 34 (CA2 1990) 19

Gonzalez v. Virginia-Carolina Chem. Co.,
239 F.Supp. 567 (E.D.S.C. 1965) 21

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 20, 24, 25

Gregory v. Ashcroft, 501 U.S. 452 (1991) 16, 18

Grey v. Hayes-Sammons Chem. Corp.,
310 F.2d 291 (CA5 1962) 21

Hawkins v. Leslie's Pool Mart, Inc.,
184 F.3d 244 (CA3 1999) 15

Hubbard-Hall Chem. Co. v. Silverman,
340 F.2d 402 (CA1 1965) 21

In re Agent Orange Prod. Liab. Litig.,
635 F.2d 987 (CA2 1980) 26

Jones v. George, 61 Tex. 345 (1884) 21

Malone v. White Motor Corp.,
435 U.S. 497 (1978) 7

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 5, 7, 14, 15, 16

Murray v. Wilson Distilling Co.,
213 U.S. 151 (1909) 18

Oubre v. Entergy Operations, Inc.,
522 U.S. 422 (1998) 20

Retail Clerks v. Schermerhorn,
375 U.S. 96 (1963) 7

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 7

Rose v. Buffalo Air Serv.,
104 N.W.2d 431 (Neb. 1960) 21

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 11

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 25, 26

United States v. Texas, 507 U.S. 529 (1993) 20

White v. Nat'l Bank of Commerce,
278 P. 915 (Cal. D. Ct. App. 1929) 21

Wis. Pub. Intervenor v. Mortier,
501 U.S. 597 (1991) 11, 14

Statutes, Rules, and Constitutional Provisions

12 U.S.C. §1715z-18(e) 18

15 U.S.C. §§1331-1339 (1965) 8, 9

15 U.S.C. §§1331-1340 (1969) 8

15 U.S.C. §1333 (1969) 8-9

17 U.S.C. §301(b) 18

29 U.S.C. §1144(c)(1) 18

7 C.F.R. pt. 2762 (1971) 11

40 C.F.R. 158.540 ..... 13, 14

40 C.F.R. 158.640(b) 13

40 C.F.R. §158.640(b)(1) 13

44 Fed. Reg. 27932 (May 11, 1979) 13

47 Fed. Reg. 53192, 53196 (Nov. 24, 1982) 13

7 U.S.C. §136(bb) 12

7 U.S.C. §136a(5)(A) 12

7 U.S.C. §136a(5)(D) 12

7 U.S.C. §136a(c)(5) 9, 23

7 U.S.C. §136c(5)c 11

7 U.S.C. §136v 6, 7, 8

7 U.S.C. §§136-137 ..... i, 1

TEX. BUS. & COM. CODE §17.41-.63 19

U.S. CONST. art. VI, cl. 2 6

Other Authorities

117 CONG. REC. 39,975-39,981 (Nov. 8, 1971) 24

117 CONG. REC. 40,020-40,068 24

118 CONG. REC. 32,448-32, 263 (Sept. 26, 1972) 24

118 CONG. REC. 33,920-33,924 (Oct. 5, 1972) 24

118 CONG. REC. 35,543-35,547 (Oct. 12, 1972) 24

Federal Environmental Pesticide Control Act of 1971: Hearings before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. And Forestry, 92nd Cong. (1971) 21-22

Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry, 92nd Cong. (1972) 22

Federal Pesticide Control Act of 1971: Hearings Before the House Comm. On Agric., 92nd Cong. (1971) 21-22

H. REP. NO. 95-663, at 18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1991 12

H.R. CONF. REP. 92-1540 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993 22

H.R. REP. NO. 92-511 ..... 14, 22

H.R. REP. NO. 95-343, at 9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1974 12

Pesticide Registration (PR) Notice 96-4 (June 3, 1996) 14

Reorg. Plan No. 3 of 1970, section 2(8)(i),
35 Fed. Reg. 15,623 (Dec. 2, 1970), *reprinted in*
5 U.S.C. app. at 610 (1970), *and in*
84 Stat. 2086 (1970) 11

S. REP. NO. 88-573 (1964),
reprinted in 1964 U.S.C.C.A.N. 2166 9

S. REP. NO. 92-838 (1972), *reprinted in*
1972 U.S.C.C.A.N. 3993 ..... 22, 23

S. REP. NO. 92-838
(Supplemental Report) (1972) 22

S. REP. NO. 92-970 (1972), *reprinted in*
1972 U.S.C.C.A.N. 3993 22-23

U.S. DEPARTMENT OF AGRICULTURE STATISTICS,
NATIONAL AGRICULTURAL STATISTICS SERVICE,
2002 CENSUS OF AGRICULTURE 2

U.S. DEPARTMENT OF AGRICULTURE STATISTICS,
NATIONAL AGRICULTURAL STATISTICS SERVICE 2, 3

U.S. DEPARTMENT OF AGRICULTURE STATISTICS 2

In the
Supreme Court of the United States

DENNIS BATES, *ET AL.*,
Petitioners,
v.

DOW AGROSCIENCES LLC,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, CALIFORNIA, CONNECTICUT, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEW YORK, OHIO, OKLAHOMA, UTAH, VERMONT, VIRGINIA, AND WASHINGTON, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The state *amici curiae,* through their Attorneys General, respectfully submit this brief in support of Petitioners. The States have a vital interest in preserving their power to regulate traditional areas of state concern, such as the protection of consumers from unfair and deceptive practices. Nothing in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§136-137, evinces an intent to eliminate the States' longstanding role in protecting their citizens and preventing deceptive conduct. Thus, the States have an interest in ensuring that FIFRA's preemption provisions are not construed more broadly than Congress intended.

The States have a further interest in defending state laws, and the court of appeals improperly held that FIFRA preempts the farmers' claims under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA") and Texas common law.

The States also have a strong interest in matters affecting agricultural production and local farmers. The 2002 Census of Agriculture, prepared under the direction of the U.S. Department of Agriculture,[1] showed that the United States has approximately two million operating farms,[2] most of which are owned by individuals or families.[3] The gross farm income in the United States for 2002 was $228 billion,[4] and the estimated value of U.S. agricultural exports in 2004 is $61.5 billion.[5] The value of U. S. peanut production in 2003 was nearly $780 million,[6] and the value of Texas's peanut production in the same year was nearly $150

---

1. *See* U.S. DEPARTMENT OF AGRICULTURE STATISTICS, NATIONAL AGRICULTURAL STATISTICS SERVICE, 2002 CENSUS OF AGRICULTURE, *at* http://www.nass.usda.gov/census/census02/volume1/us/CenV1US1.txt.

2. *Id.* (the census showed 2,128,982 farms).

3. *Id.* (the census showed 1,909,598 farms owned by individuals or families).

4. *See* U.S. DEPARTMENT OF AGRICULTURE STATISTICS, NATIONAL AGRICULTURAL STATISTICS SERVICE, *at* http://www.usda.gov/nass/pubs/agr04/04 ch9.pdf.

5. *See* U.S. DEPARTMENT OF AGRICULTURE STATISTICS, *at* http://www.usda.gov/Newsroom/0207.04.html.

6. *See* U.S. DEPARTMENT OF AGRICULTURE STATISTICS, NATIONAL AGRICULTURAL STATISTICS SERVICE, *at* http://www.usda.gov/nass/pubs/agr04/04 ch3.pdf.

million.[7] Given the size and importance to the States of the agriculture industry, they have an inherent interest in matters affecting their farmers and farm workers.

Because the efficacy of pesticides is vital to the livelihood of the States' citizen farmers and affects the quality of their agricultural commodities, the States have an ongoing interest in maintaining the broad program of federal-state cooperation in this area of pesticide regulation. Congress intended States to play a substantial role in regulating pesticides, and the court of appeals's decision weakens that role as a result of its erroneous conclusion that FIFRA preempts state law crop-injury claims.

Pursuant to express congressional authorization, the Environmental Protection Agency ("EPA") has waived review of pesticide label statements regarding the efficacy of pesticides when the EPA registers a pesticide and thereby permits it to be marketed in the United States. FIFRA provides no private cause of action, express or implied, for crop-damage claims related to the inefficacy of pesticides. No evidence suggests that Congress intended to leave the subject of pesticide efficacy completely unregulated by both state and federal governments. A decision that FIFRA preempts state damages actions for efficacy-related claims would have a consequence unintended by Congress and detrimental to the citizens of each of the States: individuals whose crops are wrongfully damaged due to the inefficacy of pesticides would effectively be deprived of any recourse under state or federal law.

SUMMARY OF THE ARGUMENT

FIFRA does not preempt state law crop-injury claims because the text, regulatory framework, and legislative history of the statute reveal no congressional intent to do so. Because of the importance

---

7. *See id.*

of state sovereignty in our federal system of government, the historic police powers of the States are not superseded by federal statute unless it is the clear and manifest purpose of Congress to preempt the States' powers. Because consumer protection law is an area traditionally regulated by the States, compelling evidence of intention to preempt is required. Absent such clear and manifest purpose, the Court should not infer the preemption of state law claims.

FIFRA's text, unlike the text of other federal statutes, contains no language explicitly proscribing the relevant state law at issue—crop-injury actions. The legislative history of the statute also reveals no congressional intent that FIFRA displace state law crop-injury claims. Because Congress has demonstrated that it can speak with "drastic clarity" when it intends to displace state law, and the importance of state sovereignty dictates a strong presumption against preemption in the interpretation of federal statutes, the Court should not conclude that the plain text of FIFRA preempts any state law crop-injury claims.

The regulatory structure of FIFRA, which defines the domain preempted by the statute, also establishes that state law crop-injury claims are not preempted. Congress has given the EPA the role of evaluating and determining the content of pesticide labels under FIFRA; consequently, the EPA's regulations define the domain expressly preempted by the statute. The EPA, however, has affirmatively chosen not to regulate the efficacy of pesticides when it evaluates and approves pesticide labels. Absent such federal regulation, there is no preemption of state law crop-injury claims.

Where Congress has chosen not to provide for federal regulation, the presumption against preemption of state regulation is at its most robust. Here, the federal government does not evaluate efficacy when it permits a pesticide to enter the market and the environment, and, absent a clear statement of congressional

intent to displace state authority—the States retain their traditional authority to provide for consumer protection laws and allow injured farmers a remedy for crop-injury claims.

ARGUMENT

Principles of federalism command congressional respect for the sovereignty of the States, including their authority to render damage judgments in litigation. As the Court has stated, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion). This "presumption against preemption" rests on the precept that the Constitution constrains the federal government, the powers of which are limited and specifically enumerated, from trampling on the reserved powers of the States.

This case presents the narrow question whether FIFRA preempts state law crop-injury claims. The text, legislative history, and regulatory framework of FIFRA do not support the conclusion that Congress intended the statute to preempt such claims. The court of appeals's decision preempting the farmers' crop-damage causes of action contravenes the purpose of FIFRA to strengthen the regulation of pesticides, as well as the fundamental precept of federalism that state law will not be deemed displaced absent an explicit congressional mandate.

I. THE TEXT AND REGULATORY FRAMEWORK OF FIFRA DO NOT SUPPORT THE CONCLUSION THAT THE STATUTE PREEMPTS STATE LAW CROP-INJURY CLAIMS.

A. The Court's Analysis Is Guided by the Presumption Against Preemption and the Purpose of Congress in Enacting FIFRA.

The Supremacy Clause prescribes a constitutional choice of law rule that gives federal law precedence over conflicting state law.[8] The Supremacy Clause thus preempts state laws that are inconsistent with federal law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption may be express or implied; within implied preemption, the taxonomy further subdivides into field preemption and conflict preemption. Here, the former is at issue, because the language of FIFRA expressly preempts state law:

> "AUTHORITY OF STATES
>
> (a) IN GENERAL.—A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this [Act].
>
> (b) UNIFORMITY.—Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this [Act]." 7 U.S.C. §136v.

The first step in express preemption analysis is to ascertain whether the express preemption provision at issue is "a 'reliable

---

8. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

indicium of congressional intent with respect to state authority.'" *Cipollone*, 505 U.S., at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)). On its face, the FIFRA preemption provision satisfies this requirement; indeed, it is difficult to envision a more "'reliable indicium of congressional intent with respect to state authority'" than a federal statutory provision entitled "Authority of States." 7 U.S.C. §136v. Preemption analysis should therefore focus on the statutory preemption language because "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.*, at 517.

Thus, the Court must "'identify the domain expressly pre-empted.'" *Medtronic*, 518 U.S., at 484 (quoting *Cipollone*, 505 U.S., at 517). To do so, the Court begins with FIFRA's text as "informed by two presumptions about the nature of pre-emption." *Id.*, at 484-85. The first presumption is "'that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.*, at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The second longstanding presumption is that "'the purpose of Congress is the ultimate touchstone' in every pre-emption case." *Id.*, at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

A proper analysis must also consider "the 'structure and purpose of the statute as a whole,' as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*, at 486 (quoting *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)).

B. The Text of Section 136v and the Overall Regulatory Structure of FIFRA Do Not Provide Clear and Manifest Evidence of Congressional Intent to Preempt Crop-Injury Claims.

By its terms, section 136v establishes five prerequisites to preemption: (1) that there be a state "requirement" (2) "for labeling or packaging," (3) that a State "impose[s] or continue[s] in effect," and that such requirement be (4) "in addition to or different from" (5) a federal requirement under FIFRA. 7 U.S.C. §136v. The farmers' claims under the Texas DTPA and Texas common law do not meet those standards.

1. Crop-Injury Claims Do Not "Impose" a State "Requirement" for Labeling or Packaging.

A jury award of damages to a plaintiff in a crop-injury claim would not require—or even necessarily induce—a manufacturer to change that product's label. In contrast to the statutes considered by the Court in *Cipollone*, FIFRA does not require any particular warning statements about the efficacy of pesticides. Because both the Federal Cigarette Labeling and Advertising Act of 1965[9] and its successor, the Public Health Cigarette Smoking Act of 1969[10] expressly mandated that a specific warning label be affixed on every package of cigarettes sold in the country,[11] a jury

9. 15 U.S.C. §§1331-1339 (1965).

10. 15 U.S.C. §§1331-1340 (1969).

11. Section 4 of the 1965 Act required the following warning to be affixed on every package of cigarettes sold in the country: "Caution: Cigarette Smoking May be Hazardous To Your Health." 15 U.S.C. §1333 (1965). The 1969 Act amended section 4 and mandated the following language: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." 15 U.S.C. §1333 (1969).

determination that such label was inadequate left the manufacturer with no choice and no means of escaping liability. The manufacturer would have to either abide by the mandate of the federal statute and be found liable in civil actions filed by consumers—or ignore the federally mandated warning requirement and face enforcement action by the government.

Because FIFRA contains no requirements similar to the cigarette acts regarding the labeling of pesticides as to efficacy, pesticide manufacturers confront no such Hobson's choice. Faced with a jury determination finding inadequate or improper labeling related to pesticide efficacy and crop injury, a pesticide manufacturer would have several feasible and rational alternatives: (1) leave the label, if any, unchanged and absorb the costs of state law crop-damages claims, (2) modify the design or marketing of the product to address the crop-injury problem, or (3) modify the label to accurately reflect the product's efficacy. These choices are not unrealistic in the context of FIFRA, given that Congress enacted the statute to balance the need for continued development of chemical products against the need to protect humans, wildlife, and the environment from unreasonably adverse effects.[12]

Indeed, the Texas farmers' claims in this case exemplify a situation wherein it does not appear that changing the product's label would remedy the problem. The parties do not dispute that Dow's Strongarm product is unsuitable for soils with a pH level of 7.2 or higher. J.A. 181. The record also reflects that the typical soil pH in the peanut farming regions of West Texas is 7.2 or higher. J.A. 125. If the product is unsuitable for an entire region, and perhaps for the soils of other peanut-growing States, it does not

12. *See, e.g.*, 7 U.S.C. §136a(c)(5); *see also* S. REP. NO. 88-573 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2166.

make sense for Dow simply to change the label and tnen continue to sell an ineffective or damaging product in such areas. Rather, it appears the most plausible outcome in this case, if the farmers were successful in their lawsuit, would be for Dow either to modify the product or to cease marketing and selling it in regions where it will harm the crops if utilized by peanut farmers. Neither course of action implicates product "labeling" or "packaging," the limited domain preempted by FIFRA.

The fact that a state law damages award in a crop-injury case could help effectuate the statutory purpose of FIFRA is evident. When damages are minor, a manufacturer required to pay a relatively small amount in compensatory monies is unlikely to choose to alter the product label because the profit margin can absorb the additional costs. In contrast, a manufacturer required to pay substantial amounts of compensatory damages because the product resulted in extensive damages to crops would likely choose to modify or remove the product from the stream of commerce, or modify the marketing or labeling of the product. In this instance, the harm of the product to agriculture would outweigh its value to society. Allowing the state law system to operate in this manner does not render compliance with the regulatory framework of FIFRA impossible, but rather appropriately supplements such regulations.

2. The EPA Does Not Regulate the Efficacy of Pesticides When Approving Pesticide Labels.

Even assuming *arguendo* that the farmers' claims constituted a state "requirement for labeling or packaging" "impose[d] or continue[d] in effect" by the State, preemption must fail because those claims are not "in addition to or different from" any federal requirement under FIFRA. The farmers' claims concern crop injury and Respondent's representations of efficacy, and Congress and the EPA have expressly exempted efficacy in the evaluation of

pesticide labels from the ambit of federal regulation. Absent such federal regulatory coverage, there is no preemption.

FIFRA was originally passed as a labeling statute in 1947, Pub. L. No. 80-104, 61 Stat. 163, requiring registration of pesticides with the Secretary of Agriculture, the display of poison warnings on labels of highly toxic pesticides, and the inclusion of other warning statements to prevent injury to people, animals, and plants. In 1970, authority for pesticide regulation was transferred to the newly-created EPA,[13] which administered the pesticide labeling requirements imposed by the Department of Agriculture. *See* 7 C.F.R. pt. 2762 (1971).

In 1972, FIFRA was strengthened by substantial amendments addressing concerns about health and the environment. The 1972 amendments were designed to give the EPA regulatory authority over the entire process of marketing and selling pesticides. After these extensive revisions, FIFRA was no longer considered merely a labeling law. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). Instead, FIFRA was transformed "into a comprehensive regulatory statute." *Id.*, at 598-99. The EPA assumed authority to determine whether, and under what circumstances, a pesticide could be registered for manufacture and sale in the United States. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). In carrying out the goals of this statute, the EPA determines if, overall, the product represents "an unreasonable risk to man or the environment." 7 U.S.C. §136c(5)c. The statute defines "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment, taking into account

---

13. *See* Reorg. Plan No. 3 of 1970, section 2(8)(i), 35 Fed. Reg. 15,623 (Dec. 2, 1970), *reprinted in* 5 U.S.C. app. at 610 (1970), *and in* 84 Stat. 2086 (1970).

the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. §136(bb).

Under the 1972 amendments to FIFRA, the EPA could register a pesticide only upon evaluating its proposed label and finding that its "composition is such as to warrant the proposed claims for it." 7 U.S.C. §136a(5)(A). The EPA found, however, that it lacked the resources to review all proposed labeling, and that the registration and reregistration process had come to a virtual halt.[14] The EPA reported to Congress that the resources spent evaluating efficacy claims sapped its ability to address fully the concerns of human health and the natural environment that are its most important tasks.[15]

Congress responded to these concerns by amending FIFRA in 1978, expressly granting the EPA authority to waive review of pesticide-efficacy claims: "In considering an application for the registration of a pesticide, the Administrator may waive data requirements pertaining to efficacy, in which event the Administrator may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy." 7 U.S.C. §136a(5)(D). This legislation was passed with the express expectation that the EPA would waive review of efficacy data as to agricultural chemicals.[16]

---

14. *See* H. REP. NO. 95-663, at 18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1991.

15. *See* H.R. REP. NO. 95-343, at 9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1974 (statement of EPA Administrator Douglas M. Costle).

16. *See* H.R. REP. NO. 95-663, at 19 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1992 ("This authority is expected to be used, in particular with respect to agricultural chemicals.").

The EPA subsequently issued a general waiver of the review of labeling claims relating to pesticide efficacy. 40 C.F.R. 158.640(b); 40 C.F.R. 158.540. The EPA explained that the waiver would allow it to focus on its "primary mandate under FIFRA . . . , the health and safety aspects of pesticides." 47 Fed. Reg. 53192, 53196 (Nov. 24, 1982). The EPA decided that efficacy review was unnecessary because efficacy claims are "effectively regulated by the marketplace." 44 Fed. Reg. 27932 (May 11, 1979). Moreover, the EPA expressly noted that,

> "*pesticide producers are aware that they are potentially subject to damage suits* by the user community if their products *prove ineffective* in actual use." 47 Fed. Reg. 40659, 40661 (Sept. 15, 1982) (emphasis added).

Therefore, EPA regulations provide that a pesticide manufacturer need not submit "efficacy" data concerning (1) "target area phytotoxicity," which is defined as whether the pesticide leaves the target crop unharmed, 40 C.F.R. §158.540, or (2) "product performance," defined as whether the pesticide controls the target pest, *id.* §158.640(b).[17]

The EPA has confirmed the absence of federal regulation in this area. In 1996, it issued a public notice explaining that "courts have erroneously concluded that because a pesticide label contained warnings regarding property damage that EPA had necessarily evaluated such warnings and found them to be truthful and adequate

---

17. The EPA continues to review pesticide labels regarding "product performance" efficacy data in certain instances involving human health or where the EPA (on a case-by-case basis) requires it. 40 C.F.R. §158.640(b)(1). The EPA regulations also provide that "target area phytotoxicity" data are "required for Special Review and certain public health situations." 40 C.F.R. §158.540. None of these limited circumstances is applicable here.

. . . . [T]his notice is intended to clarify that EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage." Pesticide Registration (PR) Notice 96-4, at 5 (June 3, 1996).

Thus, pursuant to federal regulations, the EPA reviews pesticide labels only for the adequacy of claims relating to human health and the environment—not for "target area phytotoxicity," *i.e.*, the crop-damage claims raised by the farmers in this case. 40 C.F.R. §158.540.

3. The EPA's Regulations Define the Domain Preempted By Section 136v and Confirm That State Law Crop-Damage Claims Are Not Preempted.

The Court has concluded that section 136v of FIFRA resulted in a "narrow pre-emptive overlap" and that Congress did not intend "to occupy the entire field of pesticide regulation." *Mortier*, 501 U.S., at 613. As the Court recognized in *Medtronic*, the preemptive reach of FIFRA is necessarily informed by the scope of agency regulations.[18] In *Medtronic*, the Court determined the preemptive effect of the Medical Device Amendments of 1976 on state-law claims for common-law negligence and strict liability brought against the manufacturer of an allegedly defective pacemaker. 518 U.S., at 474. The Court concluded that defective design claims were not preempted even though the Food and Drug Administration ("FDA") had approved the pacemaker. *See id.*, at 492.

---

18. *See* H.R. REP. NO. 92-511, at 1 (explaining that "[t]he Federal Government sets the program standards the States must meet. State authority to change Federal Labeling and packaging is completely preempted" and noting that the EPA has "[g]eneral authority . . . to write regulations to carry out the Act and recognize the use of specialty chemicals").

The Court reached its decision after noting that the FDA "did not 'require' Medtronic's pacemaker to take any particular form for any particular reason; the agency simply allowed the pacemaker, as a device substantially equivalent to one that existed before 1976, to be marketed without running the gauntlet of the [premarket approval] process." *Id.*, at 493-94. As such, the federal requirements did not reflect "an unambiguous conclusion" that was reached after a deliberate weighing of competing interests. *Id.*, at 501. Rather, the requirements "reflect[ed] important but entirely generic concerns about device regulation generally." *Id.*, at 501. Therefore, the recipients' manufacturing and labeling claims were not preempted. *Id.*, at 492.

The Court's decision in *Medtronic* instructs that only when the "Federal Government has weighed the competing interests . . . [and] reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case . . . and implemented that conclusion via a specific mandate" are general state-law claims preempted. *Id.*, at 501. The United States Court of Appeals for the Third Circuit, tracking the Court's *Medtronic* analysis, has concluded that FIFRA does not preempt state-law claims when the EPA has not acted in that particular area. *See Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 254-55 (CA3 1999) (state-law claims related to packaging were not preempted by FIFRA because the EPA did not regulate the packaging methods for the pesticide product at issue).

The Texas Supreme Court reached the same conclusion in *American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 24 (Tex. 2002). The *Geye* court confronted strikingly similar circumstances to those here presented to the Court—crop-damage claims brought by Texas peanut farmers under the Texas DTPA and common law related to the labeling and efficacy of pesticides. *Id.*, at 22-23. The court held that, because Congress has given EPA the role of evaluating and determining the content of pesticide labels under

FIFRA, the EPA's regulations define "'the domain expressly preempted.'" *Id.*, at 24 (quoting *Cipollone*, 505 U.S., at 517). The Texas Supreme Court recognized that, when registering a pesticide and thereby allowing it to be released into the environment, the EPA does not evaluate whether a pesticide product will be toxic to the crops it was intended to assist—and therefore does not regulate a product's labeling claims on this subject. *Id.*, at 29. Because the scope of FIFRA's preemption is dependent on the scope of the statute and the EPA's implementing regulations, the court held that FIFRA did not preempt the farmers' crop-damage claims made under Texas's DTPA and common law. *Id.*

Here, as in *Geye*, the EPA does not consider the efficacy of pesticides in its evaluation of pesticide labels. Because the EPA waived such requirement, there was no EPA or FIFRA labeling "requirement" to preempt Texas's consumer protection statute or the farmers' lawsuit. Under *Medtronic*, allowing state law crop-injury claims—which are brought under a consumer protection statute and based upon claimed inefficacy of the pesticide—will not impose any state-law requirements that are in addition to or different from federal regulations. FIFRA preemption does not sweep so broadly as to hold that state-law claims and the States' consumer protection statutes are preempted in an area that the federal government has chosen not to regulate.

C. The Presumption Against Preemption Applies with Special Force Where the Federal Government Has Chosen Not to Regulate.

The power to supplant state law is "an extraordinary power in a federalist system." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Because this power is capable of upsetting the usual balance of federal and state powers, the Court has assumed that Congress does not exercise that power lightly. *Id.* The Court has

expressed this principle as a presumption against preemption of state law. *See Cipollone*, 505 U.S., at 517-18.

As robust as that presumption is in the ordinary circumstances—where Congress has chosen to regulate and the Court is assessing state requirements concerning the same subject matter—the presumption should be substantially greater where Congress has chosen not to regulate at all.

With apologies to Commerce-Clause jurisprudence, a useful distinction can be drawn between "active" preemption and "dormant" preemption. For the former, where Congress has chosen to extend federal regulation to a specific area where States are likewise regulating, the ordinary presumption against preemption applies. But for the latter, where the federal government has chosen *not* to regulate a particular subject matter, the presumption against preemption is at its apex.

Through the Supremacy Clause, Congress no doubt possesses the authority both (1) to proscribe state regulation in a particular area and (2) to eschew any federal regulation as well. But, such a counterintuitive result should not be readily ascribed to Congress, especially in an area such as the regulation of pesticides where Congress has emphatically recognized the heightened need for adequate regulation.

Thus, were FIFRA to provide something like "notwithstanding the lack of federal regulation of efficacy, no State may prohibit misleading representations of efficacy or otherwise provide remedies for negligent crop damages from pesticides," then preemption would apply. But, absent such an extraordinarily clear statement, there should be no preemption of state authority. *Cf.*

Gregory, 501 U.S., at 460; *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985).[19]

Notably, the language of section 136v(b) does not explicitly prohibit state law crop-injury actions, and Congress has shown itself more than capable of expressing unambiguously that state law actions are preempted by federal statutes. For example, the Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-18(e), states Congress's specific preemptive intent as follows: "Mortgages insured pursuant to this section . . . shall not be subject to any State constitution, statute, court decree, common law, rule, or public policy." Similarly, in the Copyright Act of 1976, 17 U.S.C. §301(b), Congress expressly preempted all legal rights "under the common law or statutes of any State." The preemption language of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(c)(1), is equally explicit: "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Each of the referenced statutes exemplify the type of language the Court and the States expect Congress to use when it intends to displace state law claims. The absence of the same or similar express preemptive language in FIFRA evidences a lack of clear and manifest congressional intent to displace state law crop-injury claims.

According the presumption against preemption great weight properly renders Congress's displacement of state authority more

---

19. In the analogous context of sovereign immunity, the Court has "held that a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id.* (internal citations omitted) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ((quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909))).

difficult by requiring it to speak precisely in express preemption provisions. This requirement enhances legislative accountability, the foundation of our democratic system of governance. And attributing great weight to the presumption maintains federal legislative power, for as the Court has long recognized, "Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947). Consistent with these considerations, the presumption against preemption requires extraordinarily clear and manifest evidence of congressional intent to displace the police powers that have historically inhered in the States. *See Cipollone*, 505 U.S., at 516.

Morever, it is particularly significant that the Texas farmers' crop-injury claims were made in part under Texas's statutory consumer protection laws, namely the Texas DTPA, TEX. BUS. & COM. CODE §17.41-.63. J.A. 183. Because consumer protection, and unfair business practices generally, fall squarely within the ambit of the States' historic powers, *see Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (CA2 1990), compelling evidence of an intention to preempt is required to preempt state law in these areas. *Id.*; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).

FIFRA's express preemption provision clearly and manifestly indicates congressional intent to preempt state requirements inconsistent with federal labeling and packaging requirements. It does not clearly and manifestly exhibit an intent to displace all state authority, especially where there are no federal requirements because the federal government has not evaluated pesticide efficacy before allowing a manufacturer to release a pesticide into the market and the environment.

II. The Legislative History of FIFRA Confirms that Congress Did Not Intend to Preempt State Law Crop-Injury Claims.

The scope of FIFRA's preemption provision, section 136v, should also be analyzed in the context of the common law at the time of its enactment in 1972. The Court "presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). As Justice Stevens has observed, "[w]e presume that Congress understands the legal terrain in which it operates, . . . and we therefore expect Congress to state clearly any intent to reshape that terrain."[20] *United States v. Texas*, 507 U.S. 529, 540-41 (1993) (Stevens, J., dissenting) (citation omitted). Because state-law actions for crop injury related to pesticide labeling were widely available in 1972, and no evidence indicates that Congress intended to eliminate those actions, the Court should not read section 136v to do so.

A. FIFRA's Legislative History Supports the Conclusion That Congress Did Not Intend to Displace Crop-Injury Claims.

Common-law actions for crop damage related to the inefficacy of pesticides date back to the 19th Century, and were the subject of

---

20. *See also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 435 (1998) (Thomas, J., dissenting) ("[C]ommon-law doctrines 'ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'") (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)).

numerous reported decisions by 1972.[21] In fact, by 1972, nearly every state and federal jurisdiction had recognized pesticide manufacturer and dealer liability for crop damage (as well as personal injury) related to labeling of products.[22] The Court may therefore presume that Congress was aware that state law crop-damage actions related to the inefficacy of pesticides and labeling of these products were recognized and being brought regularly throughout the United States.

Prior to the passage of the 1972 amendments to FIFRA, Congress held twenty-five days of hearings[23] and issued reports

---

21. *See, e.g., Jones v. George*, 61 Tex. 345 (1884) (action against seller of "Royall's Patent or Receipt for Killing Worms," which was represented as effective against cotton worms but failed to control the worms); *White v. Nat'l Bank of Commerce*, 278 P. 915 (Cal. D. Ct. App. 1929) (crop damage action against seller of "Volck Concentrate," falsely represented to control pests without harming citrus trees); *Ebers v. Gen. Chem. Co.*, 17 N.W.2d 176 (Mich. 1945) (action for crop damage caused by inadequately labeled ethylene dichloride emulsion sold to control peach tree borers).

22. *See, e.g., Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (CA1 1965) (applying Mass. Law); *Grey v. Hayes-Sammons Chem. Corp.*, 310 F.2d 291 (CA5 1962) (applying Miss. law); *Daniels v. Atlantic Ref. Co.*, 295 F.Supp. 125 (D. Del. 1968) (applying Delaware law); *Gonzalez v. Virginia-Carolina Chem. Co.*, 239 F.Supp. 567 (E.D.S.C. 1965) (applying South Carolina law); *Eaton Fruit Co. v. California Spray-Chem. Corp.*, 445 P.2d 437 (Ariz. 1968); *Diamond Alkali Co. v. Godwin*, 112 S.E.2d 365 (Ga. Ct. App. 1959); *Bean v. Diamond Alkali Co.*, 454 P.2d 69 (Idaho 1969); *Rose v. Buffalo Air Serv.*, 104 N.W.2d 431 (Neb. 1960).

23. *Federal Pesticide Control Act of 1971: Hearings Before the House Comm. On Agric.*, 92nd Cong. (1971); *Federal Environmental Pesticide Control Act of 1971: Hearings before the Subcomm. on Agric.*

from four different committees.[24] At the hearings, what was to become section 136v of FIFRA was extensively discussed. *See, e.g., Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Agric.*, 92nd Cong. (1971). The EPA's General Counsel testified on behalf of the administration, which drafted the bill that would become the 1972 Amendments to FIFRA:

> "I would like to emphasize that the States have played a major and continuing role in pesticide regulation . . . .We wish to *encourage and not supplant* these efforts by providing that States may prohibit the use of a particular pesticide within their jurisdiction even if the pesticide is registered under the Federal authority. States thus are not precluded from imposing stricter standards or added requirements, but they may not permit any sale or use of a pesticide which is prohibited under the authority of the Act."[25]

Research of the Sen. Comm. on Agric. And Forestry, 92nd Cong. (1971); *Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on Agric. Research of the Sen. Comm. on Agric. and Forestry*, 92nd Cong. (1972); *Federal Environmental Pesticide Control Act of 1971: Hearings Before the Subcomm. on the Envt. of the House Comm. on Commerce*, 92nd Cong. (1972).

24. H.R. REP. NO. 92-511 (1971); S. REP. NO. 92-838 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3993; S. REP. NO. 92-838 (Supplemental Report) (1972); S. REP. NO. 92-970 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4092; H.R. CONF. REP. 92-1540 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4130.

25. *Federal Pesticide Control Act of 1971: Hearings Before the House Comm. on Agric.*, 92nd Cong., 1st Sess. (1971) (statement of EPA General Counsel John Quarles) (emphasis added).

The statements of the EPA's General Counsel reflect the overall tenor of the legislative history, which confirms Congress' intent that States continue to play a substantial role in the regulation of pesticides. For example, the Report by the Senate Committee on Agriculture and Forestry noted that enforcement of FIFRA would be strengthened by "authorizing cooperation with States." S. REP. NO. 92-838, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3994. The Senate Commerce Committee Report also contained a section entitled "Authority of States" indicating that the intent of the bill was "to leave to the States and local governments the authority to impose stricter regulations on pesticides [sic] use than that [sic] required under the Act." S. REP. NO. 92-970, at 44 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3994.

Consistent with that manifest intention, six years later, in 1978, Congress expressly authorized the EPA to waive any review of efficacy, 7 U.S.C. §136a(c)(5); and, as the United States conceded in earlier litigation on this same issue, "[i]n authorizing the waiver, Congress anticipated that the states would fill the regulatory gap."[26]

Thus, the legislative history of the 1972 amendments reflects the intent of Congress that the States would act as partners in the regulation of pesticides under FIFRA, and provides no hint of congressional intent to foreclose state-law claims in areas unregulated by the EPA. Indeed, the committee reports issued prior to the passage of FIFRA reveal no intent on the part of Congress to abrogate crop-injury actions under FIFRA. Each report summarizes the changes made by the bill, and none mentions any intent to

---

26. U.S. Br., *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524, Cal. Sup. Ct. (Mar. 1999), *available at* https://www.citizen.org/documents/usetcheverrybrief.pdf.

preempt state law crop-injury actions.[27] Likewise, the House and Senate floor debates on the 1972 FIFRA amendments provide no suggestion of a congressional intent to preempt state law crop-injury claims.[28]

B. The Court Should Not Infer Preemption of State Law Tort Claims Based Upon Federal Limitations of Direct Regulations or Positive Enactments of State Governments.

The absence of congressional comment on state law crop-injury claims during passage of the 1972 amendments is significant because it is improper to infer preemption of state law tort claims based upon federal limitations of direct regulations or positive enactments of state governments. As the Court stated when analyzing the similarly-worded preemption provision of the 1965 Cigarette Act in *Cipollone*, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S., at 518. Similarly, in *Goodyear Atomic Corp.*, 486 U.S. at 185, the Court recognized the difference between "direct state regulation" and "the incidental regulatory effects" of state common-

27. *See supra* note 23; House Agric. Comm. report at 1-2, 12-13; Sen. Agric. Comm. report at 1-2, 5-6; Sen. Commerce Comm. report, at 8.

28. *See* 117 CONG. REC. 39,975-39,981 (Nov. 8, 1971) (House debate); 117 CONG. REC. 40,020-40,068 (House debate and passage); 118 CONG. REC. 32,448-32, 263 (Sept. 26, 1972) (Sen. debate and passage); 118 CONG. REC. 33,920-33,924 (Oct. 5, 1972) (Sen. passage of conference report); 118 CONG. REC. 35,543-35,547 (Oct. 12, 1972) (House passage of conference report).

law damage awards,[29] concluding that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."[30] The Court reached a similar conclusion in *English v. General Electric Co.*, 496 U.S. 72 (1990), recognizing that while common-law damages awards could alter behavior, "such an effect would be 'neither direct nor substantial enough' to warrant pre-emption." *Cipollone*, 505 U.S., at 538 (Blackmun, J., concurring in part and dissenting in part) (quoting *English*, 496 U.S., at 85).

As Justice Blackmun noted in his separate opinion in *Cipollone*, state common-law tort claims serve a compensatory purpose separate from their regulatory purpose. *Cipollone*, 505 U.S., at 537 (Blackmun, J., concurring in part and dissenting in part). In fact, the primary purpose of state law claims is compensation, while any regulatory purpose or effect is only incidental. A finding of express preemption of crop-injury claims would leave individuals whose crops were wrongfully harmed by the inefficacy of pesticides without any effective remedy. And an intent to remove all means of redress for an entire class of injured citizens should not lightly be imputed to Congress, absent express indication to the contrary. As the Court noted in a similar context, "[the Atomic Energy Act's] silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct. It

29. *Id.*, at 185; *see also Cipollone*, 505 U.S., at 536-37 (Blackmun, J., concurring in part and dissenting in part) (distinguishing the direct effect of statutes and administrative regulations from the common law's indirect regulatory effect).

30. *Goodyear*, 486 U.S., at 186; *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-56 (1984) (distinguishing the authority of the Nuclear Regulatory Commission from the authority of States to impose tort liability upon those parties falling under the scope of the Nuclear Regulatory Act).

is difficult to believe that Congress would, without comment, remove all means of judicial recourse for [plaintiffs] injured by illegal conduct." *Silkwood*, 464 U.S., at 251.

Because FIFRA does not provide any express or implied private cause of action,[31] the preemption of state law claims in an area unregulated by the EPA effectively removes all recourse for individuals whose crops are damaged due to the inefficacy of a pesticide. In all of the legislative history leading to the passage of section 136v, there is not a single word or comment evidencing a clear and explicit congressional intent to preempt such crop-injury claims. In the absence of explicit federal intent to bar state law crop-injury claims expressed in the text, legislative history, or regulatory structure of FIFRA, the Court should not infer that such claims are preempted.

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit Court of Appeals.

---

31. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 991-92 n.9 (CA2 1980) (holding that no implied private cause of action exists to recover damages under FIFRA); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1035-38 (CA9 1985) (stating that "FIFRA does not authorize explicitly or implicitly a private cause of action to enforce the Act.").

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

SEAN D. JORDAN
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 936-1700

September 13, 2004